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In The

Supreme Court of the United States

October Term, 1985

No. A-926

RICHARD P. LUCAS,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF HIS PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

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78-A-2362
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POINT I

IT WAS ERROR TO ADMIT ON REBUTTAL THE ALLEGED ADMISSION OF PETITIONER

After petitioner testified at his second trial the trial Court allowed a police investigator to testify on rebuttal as to an inculpatory statement allegedly made by petitioner after his arrest. This alleged statement had previously been ordered supressed by the New York Court of Appeals because it had been obtained in violation of petitioner's right to counsel, and because it was involuntary.

This testimony by Inv. Reidy was extremely damaging to petitioner's case, as Reidy claimed that petitioner had told him that:

> " ... if he could talk to the District Attorney that he could show him that maybe he was there (at the scene of the crime) but he didn't do everything."

Reidy had testified on numerous other occasions regarding the alleged admission, and had never before claimed that petitioner had admitted to being at the scene of the crime.

Although the Court and the District Attorney both acknowledged that at no time during the prior six years had Reidy ever claimed that petitioner admitted to being at the scene of the crime (see page T-1255-56), Reidy refused to retract his perjurious testimony and the Court and the District Attorney allowed it to remain in the record. Further, the District Attorney argued that perjured testimony as fact in his opposition brief on appeal to the Appellate Division.

Respondent attempts to sway this Court by referring to the initial findings of the trial court and the Appellate Division regarding the legality of the alleged statement. Since the New York Court of Appeals reversed the findings of those courts regarding the statement, their findings are not germane to the present controversy and therefore, it is respectfully submitted that respondent's reference to same should be disregarded.

Contrary to respondent's claim, the Court of Appeals did not make a finding that the alleged admission was voluntary. In fact, the Court found exactly the opposite.

After finding that the alleged admission had been obtained in violation of petitioner's right to counsel, the Court went on to say:

> "Nevertheless, the courts below concluded that the uncounseled statement in question need not be suppressed, since, in their view, it was made 'voluntarily' and 'spontaneously' (citation omitted), this conclusion, however, is simply not supported by the record." (See Appendix C-3 of petitioner's brief in chief) (Emphasis supplied).

It is clear from the foregoing that the New York Court of Appeals made a finding that the alleged admission was obtained from petitioner involuntarily and therefore, pursuant to this Court's holding in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408, 57 L.Ed. 2d 290, should not have been admitted for impeachment purposes at petitioner's trial.

Also, the same set of facts which prompted the Court of Appeals to find that petitioner's right to counsel had been violated under New York law, establishes a violation of petitioner's Sixth Amendment right to counsel.

Prior to the time that petitioner was alleged to have made the uncounseled statement, formal charges had been filed against him, and he had appeared before a magistrate for extradition proceedings at which time he requested the appointment of counsel and although not appointed, was allowed to speak with same.

Therefore, there is no question as to whether adversary judicial criminal proceedings had been initiated against petitioner, Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877, 32 L.Ed.2d 411 (1972); Moore v. Illinois, 434 U.S. 230, 98 S. Ct. 458, 54 L.Ed.2d 424 (1977); Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L.Ed.2d 246 (1964), and as the Second Circuit stated in United States v. Brown, 699 F.2d 585 (1983):

> "When the government crosses the line from the investigatory to the accusatory stage, United States v. Lilla, 584 F. Supp. 1247, 1281(N.D.N.Y. 1982), the Sixth Amendment requires that the accused have the assistance of counsel or that the government meet the 'heavy burden of proving that any inculpatory statements thus obtained were voluntarily

> given after a valid waiver of the right to counsel'" United States v. Mohabir, 624 F.2d 1140 at 1147 (quoting from United States v. Lord, 565 F.2d 831, 839 (2d Cir. 1977).

Respondent attempts to distinguish this case from United States v. Brown, supra, because the Court in Brown limited its holding to post-indictment statements. However, an analysis of that decision reveals that the issue of whether the defendant was indicted or not was not the decisive factor in the Court's decision. The basis for the Court's decision was that the statement had been obtained in violation of the defendant's Sixth Amendment right to counsel.

Once a defendant's Constitutional right to counsel attaches, a violation of that right is just as unconstitutional whether it takes place before or after indictment, and so to is the trustworthiness of a statement obtained in violation of that right, just as suspect.

In any event, it appears that the New York courts have every intention of allowing into evidence for impeachment, statements obtained in violation of the Sixth Amendment right to counsel whether they are obtained before or after indictment. (See the New York Court of Appeals decision in People v. Maerling, 64 N.Y.2d 134, 485 N.Y.S.2d 23, in which they acknowledged the holding in Brown, supra, but stated that admissibility rests not on whether a constitutional right is implicated but on a determination of voluntariness), (see also People v. Monaghan, 118 Misc.2d 326, in which that Court also acknowleged the decision in Brown, supra, but stated that it was not bound by it.

Therefore, this case does present an opportunity for this Court to decide whether an inculpatory statement obtained in violation of the Sixth Amendment right to counsel can be admitted to impeach a testifying defendant, and to resolve the conflict that exists between the New York Court of Appeals decision in People v. Ricco, 56 N.Y.2d 320 and People v. Maerling, 64 N.Y.2d 134, the Second Circuit's decision in United States v. Brown, supra, and the Tenth Circuit's decision in United States v. McManaman, 606 F.2d 919.

This case also presents the opportunity for this Court to make clear to the State of New York and other jurisdictions, that involuntarily obtained statements may not be used against a defendant for any purpose.

POINT II

(A) PETITIONER'S AUTOMOBILE WAS NOT LEGALLY SEIZED ON OCTOBER 17, 1975 AND THEREFORE, THE SUBSEQUENT WARRANTLESS SEARCH OF THE VEHICLE ON OCTOBER 20, 1975 WAS UNCONSTITUTIONAL.

Respondent claims that part of the probable cause for the search and alleged seizure of petitioner's automobile on October 17, 1975, was that it had been seen at the bank at the same time that the victim was due to arrive there.

Although that statement was made to the magistrate who issued the search warrant, it was later proved to be false out of the mouth of one of the search warrant applicants.

Also, a prosecution witness placed petitioner and the automobile at the bank at 3:50 p.m. (T-79), and placed the victim still at his office at 4:15 - 4:30 p.m. (T-30). Respondent's own brief to the Appellate Division stated that the victim didn't leave his office to go to the bank until 4:30 p.m. (Respondent's Appellate Division brief page 19, para. G).

In any event, on October 17, 1975, the date on which respondent claims the automobile was seized, there was absolutely nothing to indicate that the automobile itself constituted evidence of a crime. Respondent has failed to state one factor which indicated to the police while searching the automobile (which is all the search warrant authorized them to do) that it was evidence of a crime, and which transformed it from an object to be searched, into an object to be seized.

Logic dictates that had the magistrate felt that the police had presented sufficient probable cause to indicate the automobile itself was evidence in the crime, he would have specifically authorized them to seize it rather than merely enter into it and search for other evidence. Since there was insufficient probable cause to indicate the automobile was evidence at the inception of the search, and the respondent has failed to articulate any factors on which the police later on October 17, 1975 relied upon to conclude that the automobile was evidence, it is clear that petitioner's automobile was not legally seized on that date.

It should be noted that respondent's claim on page # 9 of his opposition brief is misleading in that it implies Inv. Graham kept the keys to petitioner's vehicle from the inception of the search on October 17, 1975 and beyond. This is totally untrue, as Inv. Graham testified at petitioner's first trial that after the search of the automobile was completed on October 17, 1975, it was relocked and the keys were returned to the hook in the office of the parking attendant of the garage. (See attached Exhibit "A"). The fact that the police returned the keys to the parking attendant indicates that they did not seize the automobile on October 17, 1975, and did not feel that they had a legal basis for doing so.

No police officer ever testified that they had seized the automobile on October 17, 1975, and it appears that the purported seizure on that date is and always has been, a post hoc fiction created by the respondent in an attempt to sanctify the second warrantless, unconstitutional search of the automobile on October 20, 1975.

(B) THE SECOND WARRANTLESS SEARCH OF PETITIONER'S AUTOMOBILE WAS NOT LEGALLY PERMISSABLE UNDER UNITED STATES V. ROSS, 456 U.S. 798.

Since it is clear that petitioner's automobile was not legally or factually seized on October 17, 1975, it was unconstitutional for the police to re-enter and search the vehicle on October 20, 1975 without obtaining a second search warrant. United States v. Ross, 456 U.S. 798, does not authorize warrantless searches of automobiles that are legally parked, and where no exigent circumstances exist.

The respondent's reference in his statement of facts to the confession of the codefendant Graham, has no probative value since it is not a question of whether the police possessed sufficient probable cause for a second search of the automobile, but whether it was incumbent upon them to present that probable cause to a magistrate for him to decide whether a second search of the vehicle was justified.

It should be noted that this is not the first time that respondent has attempted to prejudice a Court against petitioner by resorting to the use of the codefendant's confession. On appeal to both the

Appellate Division and the New York Court of Appeals, respondent included the codefendant's confession as part of his appendix and petitioner's attorney had to make motions, which were granted, to have it stricken from the record.

Since respondent was prevented from using the codefendat's confession against the petitioner directly (see footnote at page xi of respondent's opposition brief), he has seized every imaginable opportunity to suggest to the various courts that the petitioner should be judged by what the codefendant stated in his confession. This is despite the fact that the codefendant's statement was self-serving, false, and riddled with inconsistencies.

Respondent claims that the long list of items seized in the search of petitioner's automobile (see appendix K of petitioner's main brief) fell within the scope of "other evidence of a homicide used in connection with the crime of murder" that the search warrant authorized the police to seize.

What possible evidentiary or identification purposes could have been imagined by the police for seizing the "Tom and Betty" coloring book or the rasin, or hundreds of the other items that were seized?

If the statement "other evidence of a homicide used in connection with the crime of murder" allows the police to seize such a wide ranging and extensive list of items, with no apparent evidentiary value, that is exactly why the inclusion of that language in a search warrant is unconstitutional, makes it a general warrant, and should not be allowed.

On page 12 and 13 of his opposition brief, respondent claims that this Court has previously addressed the merits of petitioner's claims regarding the illegality of the search of his automobile, when it decided the petitions of the codefendant, Graham. This is totally false. The language quoted by respondent is from the Appellate Division of New York Supreme Court, Third Judicial Department, not from this Court, and is exactly the holding that petitioner is challenging herein.

POINT III

IT WAS DOUBLE JEOPARDY TO RETRY PETITIONER FOR FELONY MURDER USING THE DISMISSED KIDNAPPING AS THE UNDERLYING FELONY

The Appellate Division's finding that there never was a kidnapping was the equivalent of a finding that petitioner was factually innocent of the crime, and since the law at that time (which is the law in this case) held that the underlying felony of a felony murder was a lesser included offense of the felony murder, it subjected petitioner to be twice placed in jeopardy to be retried for a crime he was found not to have committed.

The fact that subsequent to petitioner's appeal the law in the State of New York was changed to make the underlying felony of a felony murder a separate crime from the felony murder, is irrelevant and is ex post facto in regard to petitioner.

POINT IV

THE REMAINING POINTS RAISED BY PETITIONER IN HIS PETITION HAVE MERIT AND WARRANT REVIEW BY THIS COURT

While it is true that the Constitution does not guarantee a defendant a perfect trial, the errors committed at petitioner's trial were of a magnitude which elevated them to a Constitutional level and denied petitioner a fair trial and due process of law.

The fact that the issues raised by petitioner have been reviewed by the Appellate Division and the New York Court of Appeals does not mean they have no merit; it merely reflects an error of judgment by those Courts, and that is the reason petitioner respectfully requests this Court to intervene to protect his rights and the rights of other defendants similarly situated.

CONCLUSION

It is respectfully urged that Petitioner's application for a writ of certiorari should be granted.

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papers. Inside the vehicle itself were many personal papers belonging to a Mr. Lucas, some children's books on the back floor of the vehicle with the name of Deborah Kilb on it. Over the sun visor was a business card from the Holiday Inn at Ramsey, New Jersey, and airline tickets made out to a R. Graham for a flight to Florida, a rope, rounds of ammunition.

Q Where was the rounds of ammunition found, if you recall?

A One expended round in the back right floor of the vehicle and in the trunk of the vehicle was several other rounds of shotgun ammunition and .30-.30 caliber ammunition.

Q With respect to the evidence you just described what, if anything, did you do with it?

A I tagged the evidence at the time and took it into my custody, secured the items.

Q What, if anything, did you do with the car after you concluded with your examination pursuant to the search warrant?

A Right. The vehicle was cleaned off on the outside from the fingerprint powder I put on it and relocked and the key returned to the hook in the office of the parking attendant of the garage, and then the surveillance was

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EXHIBIT ("A")

AFFIDAVIT OF SERVICE BY MAIL

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STATE OF NEW YORK)
: SS.:
COUNTY OF DUTCHESS)

I, RICHARD P. LUCAS, being first duly sworn, deposes and says:

That on the below indicated date of notarization, I served a true and exact copy of the attached Reply and Supplemental Brief in Support of Petition for a Writ of Certiorari upon:

Honorable Stephen F. Lungen
Sullivan County District Attorney
Sullivan County Courthouse
Monticello, New York 12701

and

Honorable Robert Abrams
Attorney General of the State of New York
Department of Law
State Capitol
Albany, New York 12224

by placing and sealing copies of same in pre-addressed, postage-paid envelopes, and by depositing same in a United States Mail Box located within the Green Haven Correctional Facility, Drawer B, Stormville, New York 12582

Respectfully submitted,

Richard P. Lucas

Richard P. Lucas, pro se
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Subscribed and sworn to before me this 29 day of July 1985.

NOTARY PUBLIC

MICHAEL A. KELLY
Notary Public, State of New York
No. 4798847
Qualified in Ulster County
Commission Expires March 30, 19 87